



**APPLICATION BY HIGHWAYS ENGLAND FOR AN ORDER GRANTING
DEVELOPMENT CONSENT FOR THE A1 BIRTLEY TO COAL HOUSE
IMPROVEMENT SCHEME**

PLANNING INSPECTORATE REFERENCE NUMBER: TR010031

REGISTRATION IDENTIFICATION NUMBER: 20023039

DEADLINE 11 SUBMISSION
Network Rail Infrastructure Limited

Introduction

- 1 This document provides an update to the Examining Authority about the Protective Provisions for the benefit of Network Rail Infrastructure Limited (**Network Rail**).
- 2 The Protective Provisions requested by Network Rail to be included at Part 3 of Schedule 11 to the Order are at Appendix 1 of this document (**Network Rail Protective Provisions**).
- 3 The Network Rail Protective Provisions are agreed with the Applicant, save in relation to the indemnity at paragraph 32 of the Network Rail Protective Provisions.
- 4 On the basis that all other matters have been resolved between the parties, we make no further submissions regarding those matters save to explain that as a result of recent discussions with the Applicant, there are two amendments that have been agreed to the Protective Provisions included in the draft Order submitted by the Applicant at Deadline 9 [**REP9-003**] namely to paragraph 19 (the definition of "specified works") and paragraph 21(1) (the list of powers of the Order requiring Network Rail consent). We have underlined the agreed additional text in the attached Network Rail Protective Provisions.
- 5 We set out Network Rail's position in relation to paragraph 32, which relates to the indemnity from the Applicant in favour of Network Rail, in the following paragraphs.

The indemnity for the benefit of Network Rail at paragraph 32 of the Network Rail Protective Provisions

The proposed exclusion of the Applicant's liability for indirect losses

- 6 Network Rail requests that paragraph 32(4) of the Protective Provisions, drafted by the Applicant and submitted to the Examining Authority at Deadline 9 [**REP9-003**], be deleted from the Order when made. The Applicant's paragraph 32(4) states:

(4) In no circumstances is the undertaker liable to Network Rail under sub paragraph (1) for any indirect or consequential loss or loss of profits, except that the sums payable by the undertaker under that sub paragraph include a sum equivalent to the relevant costs in circumstances where— (a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and (b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.

- 7 Network Rail has previously made submissions in relation to the indemnity that the Applicant seeks and explained why Network Rail does not agree to the amendment to the standard form of indemnity for its benefit included in statutory orders. We do not repeat those submissions but refer the Examining Authority to the following documents: **REP4-67** (paragraph 5(iii)) and **REP9-029** (paragraphs 30-39). In addition to those previous submissions Network Rail further submits as follows.
- 8 The effect of the Applicant's proposed paragraph 32(4) is to exclude "indirect or consequential loss or loss of profit" from the scope of the indemnity. There is an express exception from that exclusion. That is where Network Rail is liable for costs to a train operator under an agreement

with such operator and where the agreement and the extent of Network Rail's liability has previously been disclosed in writing to Highways England. As described below, neither the exclusion nor the exception make sense in the context of a proper understanding of English common law and the meaning of the relevant terms used in the drafting of paragraph 32(4).

- 9 Under common law, there are two types of recoverable losses in a damages claim. First, direct losses which are the natural results of the breach in the usual course of things. Second, indirect loss and consequential loss (which mean the same thing). They are losses which are not the natural result of the breach, but arise from special circumstances of the case. For indirect losses to be recoverable under common law, they must be foreseeable. In other words, the paying party (Highways England, in this case) must be in a position to know of the special circumstances at the time of the contract - or here, when the Order was made.
- 10 By proposing the exclusion, it appears that Highways England is seeking to protect itself from losses of which it is unaware. In its Written Summary of Oral Submissions at Hearings [REP9-014], Highways England says: "*The Applicant should only be liable for losses of which it has knowledge and can control*".
- 11 This is misleading and an incorrect statement of common law principles. As noted above, common law requires that for losses to be recoverable they must be foreseeable. If they are not foreseeable – i.e. they are too remote – then they are not direct or indirect losses and so are not recoverable under law. There is no need to expressly exclude liability for loss which is unforeseeable; the law does that.
- 12 So, the effect of paragraph 32(4) as proposed by Highways England is to exclude its liability for losses it might cause to Network Rail which: (a) well established common law says ought to be recoverable as damages in a breach of contract claim; and (b) by definition, Highways England is in a position to know about. Network Rail contends that it is neither reasonable nor proper that a loss it suffers as a result of the actions of Highways England which would be recoverable under common law should be excluded from being recoverable under the Protective Provisions.
- 13 Network Rail notes that the proposed paragraph 32(4) is inconsistent with the position in Network Rail's standard asset protection agreements (a copy of which is available on Network Rail's website) where indirect and consequential losses are not excluded from the paying party's loss under an indemnity. Those agreements are regulated by the Office of Rail and Road (ORR), Network Rail's regulator, and are subject to statutory consultation. Network Rail submits that there is no good reason why the level of protection afforded Network Rail under an asset protection agreement ought to be different from that afforded by the Protective Provisions. The ORR in approving the use of the asset protection agreement takes into account a balance between the interests of Network Rail and parties carrying out developments on or near the railway. Network Rail submits that it would be sensible for the Examining Authority and, ultimately, the Secretary of State, to reach the same conclusion as the ORR in respect of the same issue, and delete paragraph 32(4) from the Protective Provisions.
- 14 If, notwithstanding Network Rail's submissions above, the Examining Authority or Secretary of State is minded to accept the exclusion of indirect and consequential loss as proposed by the Applicant, then Network Rail further submits that such exclusion is limited so that it addresses only the mischief which Highways England appears to be concerned about, namely the lack of foreseeability. In those circumstances we propose that the words following "consequential loss" in paragraph 32(4) are deleted and replaced with "that was not in the reasonable contemplation

of the parties at the time of making the Order". In that case, paragraph 32(4) would be drafted as follows:

"In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss that was not in the reasonable contemplation of the parties at the time of making the Order"

However, the Examining Authority and Secretary of State should note that such amendment would leave Network Rail open to an element of risk for which it is not funded.

- 15 Finally, Network Rail notes that costs (losses and expenses) payable by Network Rail to train operators would constitute recoverable direct losses, notwithstanding the inference to the contrary in the drafting of paragraph 32(4) proposed by Highways England. Paragraph 32(6) of the Network Rail Protective Provisions defines such costs as a "relevant costs". It is clear that if Highways England caused damage or disruption to the railway, Network Rail will be liable to train operators. It is a widely understood and accepted principle that Network Rail is liable to train operators where the railway is not available for use, and so it would be an entirely obvious – or natural– consequence of breach of the Protective Provisions by Highways England, and therefore constitute a direct loss.

The Applicant's drawing of a comparison with the indemnities in other DCOs

- 16 The Applicant, in its Written Summary of Hearings at Deadline 9 (**REF9-014**), refers to examples where the indemnity in favour of statutory undertakers by the undertaker in protective provisions excludes liability on the part of the undertaker for indirect losses. In our written submissions at Deadline 9 [**REP9-02**] Network Rail explained that there are very few confirmed orders where the indemnity in favour of Network Rail excludes indirect losses. Further, to be in any way comparable with the Applicant's proposed scheme, another scheme authorised by a Development Consent Order should be comparable in terms of the works proposed and demonstrable risk to Network Rail.
- 17 As a result, we do not consider it helpful to list all the DCOs in which Network Rail's preferred indemnity has been included by the relevant Secretary of State. However, by way of recent examples, we refer the Examining Authority to *The Northampton Gateway Rail Freight Interchange Order 2019* (which involves works by the applicant to the West Coast Mainline) and to *The Norfolk Vanguard Offshore Windfarm Order 2020* (which involves the construction by the applicant of a cable corridor under operational railway); both include Network Rail's preferred form of indemnity and indirect losses are not excluded.
- 18 An example of a DCO where the Applicant is also the undertaker, and in which Network Rail's standard indemnity has been confirmed by the Secretary of State, is *The A14 Cambridge to Huntingdon Improvement Scheme Consent Order 2016* (as corrected by the 2017 Order). That Order contains Network Rail's preferred indemnity and does not exclude liability on the part of Highways England for indirect losses or require disclosure by Network Rail of ORR regulated documents. That scheme is very similar to this scheme in terms of the interfaces with the railway with the Huntingdon scheme including the removal of a viaduct over the East Coast Mainline.

Conclusion

- 19 Network Rail requests that the Network Rail Protective Provisions are included in the Order.

20 Should the Examining Authority have any further questions regarding these submissions Network Rail will be happy to answer them.

Addleshaw Goddard LLP

17 July 2020

Appendix 1

Network Rail Protective Provisions

Part 1 - For the protection of railway interests

18. The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 32, any other person on whom rights or obligations are conferred by that paragraph.

19. In this Part of this Schedule—

"construction" includes execution, placing, alteration and reconstruction and "construct" and "constructed" have corresponding meanings;

"the engineer" means an engineer appointed by Network Rail for the purposes of this Order;

"network licence" means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of powers under section 8 (licences) of the Railways Act 1993(a) ;

"network rail" means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 (meaning of "subsidiary" etc.) of the Companies Act 2006) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

"plans" includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

"protective works" means any works specified by the engineer under paragraph 22;

"railway operational procedures" means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;

"railway property" means any railway belonging to Network Rail and— (a) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and (b) any easement or other property interest held or used by Network Rail for or connected with the purposes of such railway or works, apparatus or equipment; and

"specified work" means so much of any of the authorised development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property and includes any authorised development carried out within parcels 3/10c, 3/10d, 3/10e, 3/10f, 3/10g, 3/10h, 3/10i, 3/12a, 3/12b, 3/12c, 3/12d, 3/12e and 3/12f.

20. —(1) Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

(2) In so far as any specified work or the acquisition or use of railway property or rights over railway property is or may be subject to railway operational procedures, Network Rail must— (a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and (b) use its

reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order.

21. —(1) The undertaker must not exercise the powers conferred by articles 21 (discharge of water), 22 (authority to survey and investigate land), 23 (compulsory acquisition of land), 26 (compulsory acquisition of rights), 27 (private rights over land), 30 (acquisition of subsoil or air-space only), 31 (rights under or over streets), 32 (temporary use of land for carrying out the authorised development), 33 (temporary use of land for maintaining the authorised development), 34 (statutory undertakers), 37 (felling or lopping of trees) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act or by section 203 (power to override easements and rights) of the Housing and Planning Act 2016(a) in respect of any railway property and leasehold interests forming part of parcels 3/10c, 3/10d, 3/10e, 3/10f, 3/10g, 3/10h, 3/10i, 3/12a, 3/12b, 3/12c, 3/12d, 3/12e and 3/12f unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of telecommunications code system operators: preliminary notices) of the 1990 Act, or article 34 (statutory undertakers), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use, or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent under this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.

22. (1) The undertaker must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 46 (arbitration).

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unnecessary delay on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably

necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

23. —(1) Any specified work and any protective works to be constructed by virtue of paragraph 22(4) must, when commenced, be constructed— (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 22; (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer; (c) in such manner as to cause as little damage as is possible to railway property; and (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic on it and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of a specified work or a protective work, the undertaker must, regardless of any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Part of this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents, or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or the undertaker's employees, contractors or agents.

24. The undertaker must— (a) at all times afford reasonable facilities to the engineer for access to a specified work or protective work during its construction; and (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or protective work or the method of constructing it.

25. Network Rail must at all reasonable times afford reasonable facilities to the undertaker and the undertaker's agents for access to any works carried out by Network Rail under this Part of this Schedule during their construction and must supply the undertaker with such information as the undertaker may reasonably require with regard to such works or the method of constructing them.

26. —(1) If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction of a specified work or a protective work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work or a protective work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work or protective work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work or protective work is to be constructed, Network Rail must assume construction of that part of the specified work or protective work and the undertaker must, regardless of any such approval of a specified work or protective work under paragraph 22(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work or protective work.

(3) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving is to be set off against any sum payable by the undertaker to Network Rail under this paragraph.

(4) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 27(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

27. The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail— (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 23(3) or in constructing any protective works under the provisions of paragraph 22(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works; (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work or a protective work; (c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work; (d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution of diversion of services which may be reasonably necessary for the same reason; and (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work.

28. —(1) In this paragraph— "EMI" means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of Network Rail's apparatus; "Network Rail's apparatus" means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail's apparatus carried out after approval of plans under paragraph 22(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the undertaker's compliance with sub-paragraph (3)— (a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 22(1) in order to identify all potential causes of EMI and the measures required to eliminate them; (b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified under sub-paragraph (a); and (c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified under sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution may be selected at the reasonable discretion of Network Rail, and in relation to such modifications paragraph 22(1) has effect subject to this sub-paragraph.

(6) If at any time prior to the completion of the authorised development and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) cease to use (or procure the cessation of use of) the

undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred— (a) the undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI; (b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI; and (c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus under subparagraphs (5) or (6)— (a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus; and (b) any modifications to Network Rail's apparatus approved under those sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 23.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 32(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 27(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 46 (arbitration) to a single arbitrator to be agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.

29. If at any time after the completion of a specified work or a protective work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work or protective work appears to be such as adversely affects the operation of railway property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work or protective work in such state of maintenance as to not adversely affect railway property.

30. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a protective work in the vicinity of any railway belonging to Network Rail unless the undertaker has first consulted Network Rail and the undertaker must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

31. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work or a protective work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

32. —(1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by Network Rail— (a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it; or (b) by reason of any act or omission of the undertaker or of any person in the undertaker's employ or of the undertaker's contractors or others whilst engaged upon a specified work or a protective work, and the undertaker must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or a protective work or any such failure, act or omission; and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision

will not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this subparagraph.

(2) Network Rail must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand is to be made without the prior written consent of the undertaker.

(3) The sums payable by the undertaker under sub-paragraph (1) may include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under subparagraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator under sub-paragraph (5).

(6) In this paragraph— "the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or a protective work or any such act or omission as mentioned in subparagraph (1); and "train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 (licences) of the Railways Act 1993.

33. Network Rail must, on receipt of a request from the undertaker, at a frequency to be agreed between the undertaker and Network Rail, provide the undertaker free of charge with written estimates of the costs, charges, expenses, future cost forecasts and other liabilities for which the undertaker is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 32) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under this Part of this Schedule (including any claim relating to those relevant costs).

34. In the assessment of any sums payable to Network Rail under this Part of this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Part of this Schedule or increasing the sums so payable.

35. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of— (a) any railway property shown on the works plans or land plans and described in the book of reference; (b) any lands, works or other property held in connection with any such railway property; (c) and any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.

36. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993.

37. The undertaker must give written notice to Network Rail where any application is required and is proposed to be made for the Secretary of State's consent under article 9 (consent to transfer benefit of the Order) and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)— (a) the nature of the application to be made; (b) the extent of the geographical area to which the application relates; and (c) the name and address of the person acting for the decision-maker to whom the application is to be made.

38. The undertaker must no later than 28 days from the date that the documents referred to in article 44(1) (certification of plans, etc.) are submitted to and certified by the Secretary of State in accordance

with article 44, provide a set of those documents to Network Rail in a format to be agreed between the undertaker and Network Rail's engineers.